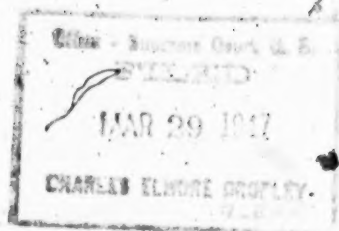


FILE COPY



No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1946

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMIN-
ISTRATOR, PETITIONER

v.

MOHAWK WRECKING AND LUMBER CO., A PARTNER-
SHIP, AND HARRY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE TEMPORARY CONTROLS ADMINISTRATOR
IN OPPOSITION TO THE MOTION TO VACATE THE SUB-
STITUTION OF PHILIP B. FLEMING FOR PAUL A. PORTER
AS PETITIONER

INDEX

	Page
Statement.....	1
Summary of Government's position.....	2
Argument.....	5
I. The President had authority to transfer the functions of the Price Administrator to the Temporary Con- trols Administrator.....	5
A. The First War Powers Act authorized the creation of an agency such as the Office of Temporary Controls to receive transferred functions.....	5
B. The powers created in the First War Powers Act apply to, and are unimpaired by, subsequent legislation, including the Emergency Price Control Act.....	13
C. The First War Powers Act authorizes the transfer of functions from a Senate-confirmed to a non-Senate-confirmed official.....	18
D. Even if the transfer is invalid under the provi- sions of the First War Powers Act alone, it can be sustained under Section 201 (b) of the Emer- gency Price Control Act.....	22
E. Current congressional proceedings show Con- gress acceptance of the action taken in E. O. 9809.....	26
II. The substitution here effected complies with the statutory provisions governing substitution.....	29
Conclusion.....	35
Appendix.....	37

CITATIONS

Cases:

<i>Billings v. Truesdell</i> , 321 U. S. 542.....	7
<i>Bowles v. American Brewery</i> , 146 F. 2d 842.....	17
<i>Bowles v. Griffen</i> , 151 F. 2d 458.....	3
<i>Bowles v. Wheeler</i> , 152 F. 2d 34.....	3
<i>Brooks v. Dewar</i> , 313 U. S. 354.....	7, 9, 29
<i>Brown v. Wright</i> , 137 F. 2d 484.....	13
<i>California Lima Bean Growers Association v. Bowles</i> , 150 F. 2d 964.....	14, 22
<i>Collins v. Porter</i> , 328 U. S. 46.....	34

Cases—Continued

	Page
<i>Fleming v. Aaron</i> (U. S. D. C. W. D. Tenn.) Civil 1154, decided March 12, 1947.....	35
<i>Fleming v. Anderson Motor Co.</i> (U. S. D. C. Md.) Civil 3249, decided February 28, 1947.....	35
<i>Fleming v. Black</i> (U. S. D. C. E. D. Pa.) Civil No. 5700, decided Feb. 4, 1947.....	35
<i>Fleming v. Donner-Hanna Coal Co.</i> (U. S. D. C. W. D. N. Y.), Civil No. 1892, decided Feb. 14, 1947.....	35
<i>Fleming v. Ell-Corr Co., Inc.</i> (U. S. D. C. S. D. N. Y.) Civil No. 33-668, decided March 20, 1947.....	35
<i>Fleming v. Krimm Lumber Co.</i> (U. S. D. C. W. D. Pa.) Civil No. 1495, decided Feb. 15, 1947.....	35
<i>Fleming v. Woodward, d/b/a White Satin Dairy and Produce Co.</i> (Sup. Ct. Oregon), decided Feb. 18, 1947.....	35
<i>Great Northern Ry. Co. v. United States</i> , 315 U. S. 262.....	7
<i>Hamilton v. Kentucky Distilleries & Warehouse Co.</i> , 251 U. S. 146.....	12
<i>Isbrandtsen-Moller Co. v. United States</i> , 300 U. S. 139.....	7, 29
<i>Porter v. Granite State Packing Co.</i> , 155 F. 2d 786.....	13
<i>Porter v. Hirahara</i> (U. S. D. C. Hawaii) Civil No. 760, decided Jan. 29, 1947.....	35
<i>Porter v. Ryan</i> (U. S. D. C. Ore.) Civil No. 3246, decided Jan. 8, 1947.....	34
<i>Porter v. Timmons</i> , 158 F. 2d 370.....	13
<i>Shrier v. United States</i> , 149 F. 2d 606, certiorari denied, 328 U. S. 728.....	14
<i>Stewart v. Kahn</i> , 11 Wall. 493.....	13
<i>Surgett v. Lapice</i> , 8 How. U. S. 48.....	7
<i>Swayne & Hoyt v. United States</i> , 300 U. S. 297.....	29
<i>United States v. Borden Co.</i> , 308 U. S. 188.....	15
<i>United States v. Hark</i> , 320 U. S. 531.....	34
<i>United States ex rel. Ordmann v. Cummings</i> , 85 F. 2d 273.....	30
<i>United States v. Jackson</i> , 280 U. S. 183.....	7, 8
<i>United States v. Midwest Oil Co.</i> , 236 U. S. 459.....	7, 9
<i>Utah Junk Co. v. Porter</i> , 328 U. S. 39.....	34
<i>Wells v. Nickles</i> , 104 U. S. 444.....	7
Constitution of the United States:	
Article II, Section 2.....	21
Statutes:	
Act of February 8, 1899, 30 Stat. 822.....	31
Act of February 13, 1925, 43 Stat. 936 (28 U. S. C., Supp. V., 780), Sec. 11.....	4, 29, 30, 31, 42
Act of June 5, 1942, Section 16, 56 Stat. 314 (50 U. S. C. App., Supp. V, 776).....	11
Act of June 25, 1942, Section 5, 56 Stat. 390 (50 U. S. C. App., Supp. V, 785).....	11

III

Statutes—Continued

Page

Appropriation Acts:

Act of July 25, 1942, making appropriations for the national defense, 56 Stat. 704.....	7
Act of October 26, 1942, making appropriations for the national defense, 56 Stat. 990.....	7
Act of July 12, 1943, making appropriations for war agencies, 57 Stat. 522.....	7
Act of June 28, 1944, making appropriations for war agencies, 58 Stat. 533.....	7
Act of May 5, 1945, making appropriations for the Department of Agriculture, 59 Stat. 136.....	7
Urgent Deficiency Appropriation Act, Public Law No. 20, 80th Cong., 1st Sess.....	28
Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, Pub. Law 548, 79th Cong., 2d Sess. (50 U. S. C. App., Supp. V, 901 et seq.).....	2
Section 1 (b).....	16, 33, 39
Section 1A (c).....	4, 16, 17, 18, 40
Section 201 (h).....	4, 13, 15, 17, 22, 40
First War Powers Act (55 Stat. 838, 50 U. S. C. App., Supp. V, 601 et seq.).....	2
Section 1.....	3, 5, 9, 18, 37
Section 2.....	19, 38
Section 3.....	38
Section 4.....	38
Section 5.....	10, 39
Section 401.....	10, 39
National Defense Act, Section 47a, 41 Stat. 778 (10 U. S. C. 441).....	11
Reorganization Act of 1945 (59 Stat. 613, 5 U. S. C. 133y, Supp. V, et seq.).....	7
Revised Statutes, Section 13, as amended (58 Stat. 118, 1 U. S. C. 29).....	33, 41
Soldiers' and Sailors' Civil Relief Act, Sec. 604 (54 Stat. 1178, 1191, 50 U. S. C. App., 501 et seq.).....	11
Stabilization Act of 1942, as amended (56 Stat. 765, 50 U. S. C. App., Supp. V, 961, et seq.).....	25
War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App., Supp. V, 1501, et seq.).....	11

Proclamation and Orders:

Proclamation No. 2714 (12 F. R. 1).....	9, 11, 43
Administrative Order of January 7, 1941 (6 F. R. 192).....	25

Executive Orders:

No. 8248 (4 F. R. 3864).....	25
No. 9024 (7 F. R. 329).....	20
No. 9070 (7 F. R. 1529).....	6
No. 9139 (7 F. R. 2919).....	21

IV

Executive Orders—Continued

	Page
No. 9247 (7 F. R. 7379).....	21
No. 9250 (7 F. R. 7871).....	25
No. 9322 (8 F. R. 3807).....	6, 7
No. 9334 (8 F. R. 5423).....	6, 20
No. 9347 (8 F. R. 7207).....	6
No. 9361 (8 F. R. 9861).....	6, 20
No. 9380 (8 F. R. 13081).....	6
No. 9392 (8 F. R. 14783).....	6
No. 9425 (9 F. R. 2071).....	6, 20
No. 9490 (9 F. R. 12707).....	20
No. 9745 (11 F. R. 7327).....	16
No. 9809 (11 F. R. 14281).....	2, 4, 9, 26, 30, 44

Supplementary Order 193, as amended (11 F. R. 13464, 13637).....

49, 50

Miscellaneous:

Congressional Record:

Vol. 31, page 3866.....	32
Vol. 87, pages 9413, 9842, 9846.....	14, 20
Vol. 88, pages 104-105, 176-177.....	15, 16, 24
Vol. 91, pages 9354, 9356.....	8, 21

Cyc. of Federal Procedure, 2d Ed., Vol. 7, pp. 334-335....

30

Hearings on H. R. 1968, 80th Cong., 1st Sess., before the Committee on Appropriations:

House Hearings, pages 1-4.....	27
Senate Hearings, pages 1-12.....	28
House Report 960, 55th Cong., 2d Sess.....	32
House Report 971, 79th Cong., 1st Sess.....	9
House Report 1075, 68th Cong., 2d Sess.,.....	31
New York Times, January 1, 1947, page 22.....	11
Reorganization Plan No. I (5 U. S. C. 133t [Note]).....	25
Sutherland, <i>Statutory Construction</i> , 3d Ed., Vol. 1, Section 2012.....	15

Urgent Deficiency Appropriation Bill for 1947 (H. R. 1968, 80th Cong., 1st Sess.).....

27, 28, 29

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 583

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMIN-
ISTRATOR, PETITIONER

v.

MOHAWK WRECKING AND LUMBER CO., A PARTNER-
SHIP, AND HARRY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE TEMPORARY CONTROLS ADMINISTRATOR
IN OPPOSITION TO THE MOTION TO VACATE THE SUB-
STITUTION OF PHILIP B. FLEMING FOR PAUL A. PORTER
AS PETITIONER

STATEMENT

On December 16, 1946, on motion of the Acting Solicitor General this Court ordered that Philip B. Fleming, Temporary Controls Administrator, be substituted in the above-entitled proceeding in place of Paul A. Porter, Administrator of the Office of Price Administration, resigned. The motion read: "The Solicitor General suggests to the Court the resignation of the Honorable Paul A. Porter, as Administrator, Office of Price

Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

After the Order granting substitution was entered, respondents filed a motion to vacate it, and the Administrator filed a memorandum opposing the motion. On January 6, 1947, this Court ordered that further consideration of the motion be deferred to the hearing on the merits. Respondents filed a brief in support of the motion on March 3, 1947, and the present brief is filed in response thereto.

SUMMARY OF GOVERNMENT'S POSITION

It is the Government's position that sufficient authority to create the Office of Temporary Controls in the Office for Emergency Management in the Executive Office of the President, and to transfer the functions of the Administrator of the Office of Price Administration to the Temporary Controls Administrator is found in the First War Powers Act (55 Stat. 838, 50 U. S. C. App., Supp. V, 601 et seq.), and in the Emergency Price Control Act of 1942, as amended, (56 Stat. 23, 50 U. S. C. App., Supp. V, 901, et seq.). The underlying question is whether Congress in this legislation intended to grant the President power to accomplish the transfer and consolidation of the Office of Price Administration and its functions effected in Executive Order 9809. The inten-

tion to do so has been shown in several ways, including Congressional acceptance of similar Presidential action in the past, and the recent passage of appropriation legislation in the course of which the Office of Temporary Controls is treated as the lawful repository of the functions of the Office of Price Administration and General Fleming is treated as the lawfully appointed successor to the functions of the Price Administrator.

The respondents' argument that Congress relied on the Administrator's personal discretion and judgment in the exercise of the functions set forth in the Emergency Price Control Act ignores the following facts: (1) the Administrator's settled practice of delegating important functions to others whose names were not submitted to the Senate has been almost unanimously approved by the courts;¹ (2) the authority given to the President by Section 1 of the First War Powers Act is a sweeping authority to make "such redistribution of functions * * * as he may deem necessary"; (3) Congress has impliedly ratified the President's consistent construction of this Act as authorizing transfers and consolidations where

¹ Function of instituting law-suits; *Bowles v. Wheeler*, 152 F. 2d 34 (C. C. A. 9), certiorari denied, 326 U. S. 775. Function of issuing maximum rent regulations; *Bowles v. Griffen*, 151 F. 2d 458 (C. C. A. 5). Respondent's argument as to non-delegability is based on just one of six circuit court of appeals decisions, the other five of which (See Government's main brief herein, p. 15) have held that the Administrator may delegate the power to sign and issue subpoenas.

the transferred functions and offices were created subsequent to the passage of the Act, and also where the transfer was from a Senate-confirmed to a non-confirmed officer; (4) the President's powers under the First War Powers Act do not terminate until six months after the termination of the war, and the war has not been terminated; (5) the transfer was authorized under the provisions of Section 201 (b) of the Emergency Price Control Act since the Office of Economic Stabilization (with which the Office of Price Administration was consolidated) and the Office for Emergency Management in the Executive Office of the President (within which the Office of Temporary Controls was placed) had functions with respect to commodities controlled by the Office of Price Administration; (6) Section 1A (c) (2) of the Price Control Extension Act in no way purports to amend or repeal the authority granted in Section 201 (b) of the Emergency Price Control Act or in the First War Powers Act; (7) the authority granted in these two statutes is consistent with the Constitutional provision that Congress may vest the appointment of inferior officers in the President alone; and (8) the very recent Congressional proceedings show an acceptance by Congress of the transfer effected by Executive Order 9809. Respondents further err in relying on the provisions of the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C., Supp. V, 780) as to sub-

stitution, since the requirements of that statute have been satisfied.

ARGUMENT

I. The President had authority to transfer the functions of the Price Administrator to the Temporary Controls Administrator

A. The First War Powers Act authorized the creation of an agency such as the Office of Temporary Controls to receive transferred functions

The First War Powers Act is an emergency measure designed to give the Executive the broadest authority to transfer government functions and reorganize government agencies. The powers granted the President expire six months after termination of the war and at such time, the transferred functions and powers revert to their original source. The crux of the Act is found in Section 1, *infra*, pp. 37-38, which provides that:

* * * the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, * * *

Although the quoted language does not specifically state that the President may create a new agency which will consolidate the functions and powers previously exercised by one or more other agencies, the statute has always been construed by the executive department to confer such authority. For example, under its provisions, the National Housing Agency was created on February 24, 1942, by Executive Order 9070 (7 F. R. 1529), consolidating the functions of the Federal Housing Administrator, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Company, etc.; the War Food Administration² was created on April 19, 1943, to include the former functions of the Farm Credit Administration, Food Production and Distribution Administration, Commodity Credit Corporation, etc.; the Office of War Mobilization was created with new powers and functions in May, 1943, by Executive Order 9347 (8 F. R. 7207); the Office of Economic Warfare on July 15, 1943, by Executive Order 9361 (8 F. R. 9861); the Surplus War Property Administration on February 19, 1944, by Executive Order 9425 (9 F. R. 2071); the Foreign Economic Administration, on September 25, 1943, by Executive Order 9380 (8 F. R. 13081). These are but some of the transfers of powers and functions and consolidations in which new offices, agen-

² See E. O. 9334 (8 F. R. 5423), amending E. O. 9322 (8 F. R. 3807). See also E. O. 9392 (8 F. R. 14783).

cies and bureaus have been created by the President under this provision. Such contemporaneous and consistent construction by the Executive to whom the power was granted is entitled to great weight. *Billings v. Truesdell*, 321 U. S. 542, 552-53; *United States v. Jackson*, 280 U. S. 183, 193; *United States v. Midwest Oil Co.*, 236 U. S. 459; *Surgett v. Lapice*, 8 How. U. S. 48.

Furthermore, Congress has appropriated funds³ for the use of these agencies, thus indicating its acquiescence in such Executive construction of the Act. *Brooks v. Dewar*, 313 U. S. 354; *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139; *Wells v. Nickles*, 104 U. S. 444, 447.

The legislative history of the Reorganization Act of 1945 (59 Stat. 613)⁴ confirms the position outlined above. After extensive consideration of the President's use of the powers granted in the First War Powers Act, it was decided not to

³ For appropriations for the War Production Board, see Act of July 25, 1942, 56 Stat. 704, 709; Act of July 12, 1943, 57 Stat. 522, 532-533; Act of June 28, 1944, 58 Stat. 533, 541-542. For the Board of Economic Warfare, see Act of October 26, 1942, 56 Stat. 990, 996; Act of July 12, 1943, 57 Stat. 522, 523. For the War Food Administration, see Act of May 5, 1945, 59 Stat. 136, 152-153, which refers specifically to the duties transferred to the Administrator by E. O. 9322 and other similar executive orders.

⁴ "It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 277.

amend or repeal that Act by the Reorganization Act of 1945, and this decision was made after Congress had shown an awareness that new agencies had been created by executive order.⁵ This knowledge on the part of Congress, added to the history previously indicated, makes it reasonable to apply the principle that when Congress knows of the construction placed by the Executive on an Act and fails to amend it, as was the case here, it may normally be assumed that the Act has been rightly construed. *United States v. Jackson*, 280 U. S.

⁵ Representative Whittington, who was in charge of the original bill during the debate in the House on the measure, in response to a question as to the effect of the Act on the President's war powers, stated that:

"* * * when this bill was introduced by our distinguished chairman, when a similar bill was introduced in the Senate, there was a provision to repeal in whole or in part in one or both of those bills the First War Powers Act. This committee took the position that that is a big question. It was being considered by this Committee on the Judiciary if not by other committees of the House. The Committee on the Judiciary reported the first war powers bill. We studied the question. We went into it. The war powers conferred upon the President expire 6 months after the war automatically. We ran into the difficulty that before we know it if we undertake in this present bill dealing with reorganization to also provide for modification, repeal, or amendment of the War Powers Act, we might authorize the continuance of some agencies that Congress had not heretofore provided for. The bill does not amend or repeal the First War Powers Act." (91 Cong. Rec. 9356.)

See also, 91 Cong. Rec. 9354, where the same speaker stated:

"There are about 58 in all. All of these independent agencies are either established directly by an act of Congress or

183, 196-197; *United States v. Midwest Oil Co.*, 236 U. S. 459, 472, 473; *Brooks v. Dewar*, 313 U. S. 354, 361.

Indeed, it may reasonably be argued that no "new" agency has been created at all, since the Office of Temporary Controls is merely a subdivision of the Office for Emergency Management of the Executive Office of the President—an office which was, of course, existing at the time of the enactment of the First War Powers Act.

Respondents argue also that the proviso in Section 1 of the First War Powers Act, *infra*, pp. 37-38, that the authority there conferred "shall be exercised only in matters relating to the conduct of the present war" limits the exercise of that authority to a period of actual hostilities. However, Presidential Proclamation 2714, *infra*, pp. 43-44, which declared the end of hostilities (but also reaffirmed the continuation of a "state of war") was not issued until December 31, 1946, whereas Executive Order 9809, *infra*, pp. 44-49, was issued on December 12, 1946, and respondents do not attempt, nor could they, in the face of the plain lan-

they are established by the Chief Executive under power we have conferred upon him."

The report of the House Committee on Expenditures in the Executive Departments (H. Rep. 971, 79th Cong., 1st Sess.) also indicates extensive consideration of the First War Powers Act in relation to the differences between exercise of executive power under that Act and the one reported out by the Committee.

guage of Sections 5 and 401 of the Act* properly argue that the end of hostilities in itself caused a reversion of powers exercised under the Act. Nothing in the debate on the First War Powers Act quoted by respondents (Brief, pp. 15-17) impairs this view or supports their contention that the end of hostilities terminated the powers conferred on the President by the Act. There is no reference at all therein to hostilities; in fact, Representative Hancock referred to "when the war and emergency passes," as the time for reversion of powers conferred by the Act. He further stated:

"* * * the very last paragraph of the last title provides that titles I and II of this bill shall remain in force during the continuation of the present war and for 6 months after the termination of the war, or until such earlier date—we were rather careful to insert this safeguard—as Congress by a concurrent resolution or the President may designate."

* Section 5 provides: "Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding."

Section 401 provides: "Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate."

It is therefore clear that even if "hostilities" is given the identical meaning as "war," the powers conferred by the Act would continue to exist for six months after December 31, 1946, the date on which hostilities ceased.

In any event, the terms "termination of the war" and "cessation of hostilities" do not have identical meanings. Both Congress and the courts have treated them differently. For example, many war-time statutes were expressly limited in duration until six months "after the termination of hostilities in the present war, as proclaimed by the President, * * *," or during the "time of actual or threatened hostilities"; whereas other legislation passed in the same period was made effective until " * * * six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate." This difference

⁷ See, e. g., Section 3 of the War Disputes Act (57 Stat. 163, 164, 50 U. S. C. App. 1501, et seq.) commonly known as the Smith-Connally Act. For a complete listing of such statutes quoting the pertinent language, see the *New York Times* for January 1, 1947, page 22, where the list of statutes affected by Proclamation 2714 (12 F. R. 1) declaring " * * * that hostilities have terminated," are set out.

⁸ See, e. g., the National Defense Act, Section 47a (41 Stat. 778, 10 U. S. C. 441) providing for R. O. T. C. training. See also *New York Times*, *supra*.

⁹ Act of June 5, 1942, Sec. 16, 56 Stat. 314, 317 (50 U. S. C. App., Supp. V, 776; Act of June 25, 1942, 56 Stat. 390, 391 (50 U. S. C. App., Supp. V, 785); Soldiers' and Sailors' Civil Relief Act, Sec. 604, 54 Stat. 1178, 1191 (50 U. S. C. App. 584); First War Powers Act, *supra*.

in phraseology is significant, particularly since the use of the phrase "hostilities in the present war" indicates that a lesser period is being included in a greater.

So, too, the courts have recognized this distinction and have upheld legislation based on the war power after the termination of hostilities. See, e.g., *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146. There the President had approved the War-time Prohibition Act, on November 21, 1918, after the armistice, and the plaintiff in that case, on October 10, 1919, brought suit to enjoin the enforcement of the Act contending that it had become void because the war emergency had passed. The Court assumed for the purposes of the argument that the existence of a technical state of war did not support the exercise of the war powers. It then held that the cessation of hostilities did not end the war power, but that that power included the power "to remedy the evils which have arisen from its rise and progress" (p. 161), and continued for the duration of the emergency. Concluding, for reasons set forth below,¹⁰ that the emergency still

¹⁰ See 251 U. S. 146, 162. The reasons advanced by the Court included the fact that peace treaties had not yet been concluded (which is equally true today); that other war activities had not yet been brought to a close (we are still maintaining armies of occupation in enemy countries); that railways were still under national control; that manpower had not yet been restored to a peace footing (today we still have an army three times its prewar size, and a draft law was in full effect when the Executive Order here involved was issued).

existed, the Court held the Act valid, even though hostilities had long ceased. See also *Porter v. Granite State Packing Co.*, 155 F. 2d 786 (C. C. A. 1); *Stewart v. Kahn*, 11 Wall. 493; *Brown v. Wright*, 137 F. 2d 484 (C. C. A. 4); *Porter v. Timmons*, 158 F. 2d 370 (C. C. A. 4).

B. The powers created in the First War Powers Act apply to, and are unimpaired by, subsequent legislation, including the Emergency Price Control Act

If there were any doubt of the prospective application of Title I of the First War Powers Act to subsequently created agencies or departments, it has been removed by numerous Congressional acts indicating the legislative intent that transfers of functions created since its enactment could be made under its authority. The first of such acts is the Emergency Price Control Act of 1942. Section 201 (b) of that Act, *infra*, pp. 40-41, in broad terms authorizes the President to transfer to the Office of Price Administration powers and functions relating to priorities and rationing, and from the Office of Price Administration, its powers and functions with respect to a particular commodity or commodities. The provision contains this significant reservation, however:

* * * but, notwithstanding any provision of this or *any other law*, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or

to the Administrator * * *. [Italics added.]

While there is no explicit reference here to the First War Powers Act, references to that Act during consideration of this provision,¹¹ and the fact that it was the only statute then in effect which provided generally for agency transfers,¹² indicates that the legislators had in mind the First War Powers Act.

The whole subject was exhaustively treated by the Emergency Court of Appeals in *California Lima Bean Growers Association v. Bowles*, 150 F. 2d 964, 966-967, in which it was squarely held "that a natural and unrestrained reading of the language just quoted [Sec. 1 of the First War Powers Act] requires the conclusion that the power conferred upon the President to transfer functions from one to another executive agency was intended to extend to any and all functions whether existing before or after passage of the First War Powers Act." See also, *Shrier v. United States*, 149 F. 2d 606 (C. C. A. 6), certiorari denied, 326 U. S. 728.

¹¹See footnote 13. While there are some expressions contrary to those shown in footnote 13 in the Senate debates (87 Cong. Rec. 9846) they are more than balanced by the indicated subsequent legislative history, and the practical and contemporaneous construction given by the House, in appropriations legislation, and acceded to by the Senate. See footnote 3, *supra*, p. 7.

¹²The legislative history of the First War Powers Act indicates that consideration was given to the fact that the President's authority under the Reorganization Act of 1939 had expired. 87 Cong. Rec. 9842.

Nor could it be contended that Section 201 (b) of the Emergency Price Control Act, *infra*, pp. 40-41, being a later statutory enactment, is a *pro tanto* repeal of the First War Powers Act, so that insofar as the transfer of functions of the Office of Price Administration is concerned, the First War Powers Act is not available as a source of authority. It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Borden Co.*, 308 U. S. 188, 193; *Sutherland on Statutory Construction*, 3rd Ed., Vol. I, Sec. 2012. Moreover, the legislative history of the Emergency Price Control Act would indicate that the provisions of the First War Powers Act were regarded by Congress as not being repealed or in any way restricted by the bill which later became the Emergency Price Control Act.¹³ In addition,

¹³ The following appears in the Senate debates on January 9, 1942:

"MR. BONE. * * * I should like to suggest one thing that has come to my attention recently in respect to the proposal before us. Recently Congress passed a law authorizing the President to exercise powers which he heretofore had been denied the right to exercise. He is authorized now by existing legislation to turn over the functions of any department to any other department. That is a blanket, sweeping grant of legislative power given to the President, which is without any limit whatever. It is not repealed, either directly or by implication, in this measure, and it would therefore remain law."

Senator Brown, who was in charge of the bill, confirmed the interpretation placed on the provision by Senator Bone.

the fact that the Price Control Act in Section 1 (b)¹⁴ provided for continued enforcement activities even after expiration of the Act, but nowhere provided specifically for the agency which was to conduct such activities, suggests that Congress contemplated such provision would be made pursuant to the President's authority under the First War Powers Act.¹⁵ Indeed, the President acted on this assumption when upon the suspension of the Price Control Act on June 30, 1946, he effected in Executive Order 9745 (11 F. R. 7327²) under authority of the First War Powers Act, the continuation of the Office of Price Administration for the purpose, among others, of carrying out the

He also pointed out that although power previously granted to the President in the "Van Nuys Act" (First War Powers Act) was not affected, the addition of Section 201 (b) had been suggested by Senator Taft who felt that "if the President found it would be wise to transfer the control over any *particular commodity* to an agency specially equipped, the President unquestionably would have the authority to do so." 88 Cong. Rec. 176-177. [Italics added.] See Point D, *infra*, pp. 22-26.

¹⁴ Sec. 1 (b) provides in part: "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

¹⁵ It was not until the Price Control Extension Act of 1946, effective July 25, 1946, that Congress decided (in subparagraph (c) (2) of Section 1A of that Act) to reserve to itself the right to designate what agencies should exercise the functions of the Office of Price Administration after that agency expires.

enforcement functions surviving by virtue of Section 1 (b) of the Act.

Even if Section 201 (b) could be properly construed to restrict the President's authority under the First War Powers Act, it may be that the reference in Section 201 (b) to the transfer of functions "with respect to a particular commodity or commodities" would have no application at all to a transfer of enforcement functions. (Cf. *Bowles v. American Brewery*, 146 F. 2d 842, 847 (C. C. A. 4). We shall argue later herein that the authority in Section 201 (b) should not be read so narrowly (see Point D, *infra*, pp. 22-26). If, however, the Court adopts this narrow construction and decides that Section 201 (b) has no reference to the transfer of enforcement functions, that would constitute additional support for our present point that the authority under the First War Powers Act to transfer enforcement functions is unrestricted by Section 201 (b) of the Price Control Act.

Finally, even if the authority for a transfer of functions under the First War Powers Act was superseded or restricted by Section 201 (b) of the Price Control Act, the authority granted under Section 201 (b) itself is ample to sustain Executive Order 9809. This point is developed below under Point D, *infra*, pp. 23-24.

Nor is there any merit in respondents' contention that Section 1A (c) (2), *infra*, p. 40,

of the Emergency Price Control Act, added by the Price Control Extension Act of 1946, directing the President to recommend to Congress by April 1, 1947, the established departments or agencies to be charged with administering price controls "after June 30, 1947," indicates that Congress had reserved to itself the power to determine the recipient of the Price Administrator's functions. By its very terms, the Extension Act is obviously inapplicable to a transfer such as the present one which takes place *before* June 30, 1947. If Congress had intended to limit the President's powers while the Emergency Price Control Act was in full force and effect prior to June 30, 1947, it would have repealed or amended Section 201 (b). The mere fact that this section was retained intact, conclusively disposes of respondents' contentions.

C. The First War Powers Act authorizes the transfer of functions from a Senate-confirmed to a non-Senate-confirmed official

Respondents do not point to any restrictive language in the First War Powers Act which prohibits the transfer from an agency whose administrator has been confirmed by the Senate, to an agency whose head has not been so confirmed. Any such contention is barred by the breadth¹⁶ of the language of Section 1, previously set forth.

¹⁶ Also see footnote 13, *supra*, showing that in the Senate debate on the bill which became the Emergency Price Control Act, the First War Powers Act was described as granting the President unusual emergency powers.

But there is also a provision of Section 2 of that Act which authorized the transfer to an agency headed by Philip B. Fleming even though it might not have been authorized if the agency had been headed by some other person. Section 2 provides:

* * * In carrying out the purposes of this title the President is authorized to *utilize, coordinate, or consolidate* any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or *officers now existing by law*, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. [Italics supplied.]

It would be absurd to construe this authority to "utilize * * * officers now existing by law" as requiring such officers as were previously confirmed by the Senate to be resubmitted in connection with the receipt of the new functions. Such construction would, in effect, require congressional action for each intended transfer of functions, a result at cross purposes with the broad grant of power intended by Congress to be vested in the President. In effecting the transfer here under consideration, the President did *utilize an officer then existing by law*, for Philip B. Fleming, the Temporary Controls Administrator, had been appointed Federal Works Administrator.

(an office which he still retains), and had been confirmed as such Administrator by the Senate on December 4, 1941 (87 Cong. Rec. 9413), fourteen days prior to enactment of the First War Powers Act.

Moreover, even if the Temporary Controls Administrator had, in fact, not been an officer at the time of enactment of the First War Powers Act, the consistent executive construction of the Act supports the conclusion that he could lawfully receive a transfer of the functions of the Price Administrator. The President has, without submission for Senate confirmation, appointed the administrative heads of agencies created under the Act,¹⁷ and the Congress, which could not have

¹⁷ See, E. O. 9024 (7 F. R. 329) creating the War Production Board, whose chairman, appointed by the President without Senate confirmation, received transfers of functions and powers from the Secretaries of the War and Navy Departments. See also, E. O. 9490 (9 F. R. 12707).

E. O. 9425 (9 F. R. 2071) established the Surplus War Property Administration with a blanket provision that "all functions, powers, and duties relating to the transfer or disposition of surplus war property, heretofore conferred by law on any Government agency may, to the extent necessary to carry out the provisions of this order, be exercised also by the Administration," to be appointed by the Director of War Mobilization.

E. O. 9334 (8 F. R. 5423) created the War Food Administration with an Administrator "appointed by the President and . . . directly responsible to him." The order further provided that the Administrator could exercise statutory functions conferred upon the Secretary of Agriculture.

E. O. 9361 (8 F. R. 9861) established the Office of Economic Warfare, the head of which was a Director appointed by the

been altogether unaware of this construction,¹⁸ has indicated its approval by appropriating funds for the use of such agencies and the payment of their employees and officials.¹⁹ Such construction of the Act is entirely consistent with Article II, Section 2, Clause 2 of the Constitution, which provides that " * * * The Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone * * * " ²⁰

President, who was given authority to exercise some of the * * * functions, powers and duties * * * of the Secretary of Commerce with respect to * * * certain RFC chartered corporations and the Export-Import Bank of Washington.

¹⁸ In the debates on the Reorganization Act of 1945, the following remarks were made by Congressman Whittington, who was in charge of the bill: " * * * There are many reorganizations under the First War Powers Act. I will give you an illustration that has impressed me, the Department of Labor. There was one reorganization Executive order after the other and while I have not conferred with him, I give it to you as my judgment from my study and general observation that the present Secretary of Labor was really shorn of any substantial power to solve the great labor problems in the country." (91 Cong. Rec. 9354.)

For example, see E. O. 9139 (7 F. R. 2919) establishing the War Manpower Commission (whose Chairman was not submitted for Senate confirmation) and transferring many functions of the Department of Labor to such Commission. See also E. O. 9247 (7 F. R. 7379).

¹⁹ See footnote 3, p. 7.

²⁰ Indeed, the President's action might independently be sustained if this Court were to treat the appointment as a recess appointment under Art. II, Sec. 2, Cl. 3, i. e., under the President's power to fill vacancies "during the Recess of the Senate: by granting Commissions which shall expire at the end of their next Session."

See also *California-Lima Bean Growers Association v. Bowles*, *supra*, wherein the court sustained a transfer of power, pursuant to authority conferred by the First War Powers Act, from the Secretary of Agriculture, a Senate-confirmed officer, to the War Food Administrator, a non-confirmed officer.

D. Even if the transfer is invalid under the provisions of the First War Powers Act alone, it can be sustained under Section 201 (b) of the Emergency Price Control Act

Assuming, *arguendo*, that the President lacked authority under the First War Powers Act to effect a transfer of the functions of the Price Administrator to the Temporary Controls Administrator, such transfer can be sustained under the provisions of Section 201 (b) of the Emergency Price Control Act of 1942. The section provides in part:

The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities, but notwith-

standing any provision of *this* or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred. [Italics supplied.]

The italicized language clearly demonstrates that the section is not a mere restriction, but *confers a power* upon the President to effect a transfer in accordance with its provisions. The comments of its sponsor, Senator Taft, who stated that it was designed to permit the President, if he saw fit, to realign the war emergency program from a horizontal structure (e. g., Office of Price Administration exercising pricing regulations; War Production Board and its successors, priorities and industrial rationing; Secretary of Agriculture, farm production controls, etc.) to a vertical structure (e. g., Secretary of Agriculture exercising all controls, production, pricing, rationing, enforcement, with respect to milk),²¹ indicate

²¹ Senator Taft stated: "There was much testimony to the effect that rather than divide the powers by giving one man the power to fix prices across the board, giving the next man power to fix priorities across the board, and some other man the power to buy and sell across the board, it would be better

that it was designed to supplement power previously granted in the First War Powers Act.²² It was clear that under the First War Powers Act, the President could, for example, transfer the entire priorities power from one agency to another. Senator Taft, however, was fearful that perhaps that Act would not permit the splintering of a function along commodity lines so as to permit different agencies to exercise part of the pricing or enforcement functions granted by Congress in the Emergency Price Control Act. It was, therefore, to suggest the availability of this type of control structure that the Senator recommended that Section 201 (b) be inserted in the latter Act,

Respondents stress the provision of Section 201 (b) that the transfer of functions with respect to a commodity may be made only to an agency having functions relating to such commodity. But this requirement is satisfied since the Office of Economic Stabilization, simultaneously consolidated with the Office of Price Administration into

to divide by commodity groups. I think perhaps it would be, if we had an over-all board which determined the general policy of fixing prices, but that seems very difficult to obtain. I was prepared to say that it would be all right to go ahead with the set-up in this bill, dividing the powers in this way, but I felt that we should at least give the President the power to divide the powers up the other way if it developed, as we went on, that it would be wise to do that." 88 Cong. Rec. 104-5.

²² See footnote 13, p. 15.

the Office of Temporary Controls, clearly had functions with respect to commodities controlled by the Office of Price Administration.²³ Moreover, the Office of Temporary Controls is specifically placed in the Office for Emergency Management in the Executive Office of the President,²⁴ which has been responsible for the over-all direction of the price control and stabilization program, thus, also, having functions with respect to the commodities concerned.²⁵

Congress was aware of the fact, at the time of enactment of Section 201 (b), that emergency agencies were headed by officers who had not been confirmed by the Senate (e. g., the War Production Board; Office of Civilian Defense; Lend Lease Administration; Office of Defense Transportation). Congress nevertheless did not provide that the recipient of functions transferred under Section 201 (b) must first be submitted for Senate confirmation. Hence, there is reason for asserting that Congress contemplated that, for example,

²³ See, E. O. 9250 (7 F. R. 7871).

²⁴ The Office for Emergency Management in the Executive Office of the President was established pursuant to the Reorganization Act of 1939 (Reorganization Plan I, 5 U. S. C. 133t [note]; E. O. 8248, 4 F. R. 3864; Administrative Order of Jan. 7, 1941, 6 F. R. 192).

²⁵ See, E. O. 9250 (7 F. R. 7871) which established the Office of Economic Stabilization in the Office for Emergency Management under authority contained in the Stabilization Act of 1942, as amended (56 Stat. 765, 50 U. S. C. App., Supp. V, 961-971).

the War Production Board could have received a transfer of the pricing function, e. g., with respect to steel, under Section 201 (b). It was contemplated, in other words, that transfers might be made from Senate-confirmed to non-Senate-confirmed officers.

It is, therefore, clear that the transfer of the Price Administrator's functions to the Temporary Controls Administrator can be sustained under the provisions of the Emergency Price Control Act independently of authority derived from the First War Powers Act.

E. Current Congressional proceedings show Congress' acceptance of the action taken in E. O. 9809

If respondents' contentions had any basis in fact, it would be expected that Congress, whose powers had been allegedly usurped, would in its first contact with the new "unauthorized office" make its objections clearly known. But, on the contrary, Congress has acted in a manner indicating approval of Executive Order 9809. The Temporary Controls Administrator, Philip B. Fleming, was summoned by the House and Senate Committees on Appropriations to testify in their hearings on the Presidential request for a deficiency appropriation for the Office of Temporary Controls, and after the Administrator fully explained the nature of the consolidation of the various war agencies by Executive Order 9809 there was no expression de-

nying its validity or contesting General Fleming's status by the Committee members.²⁶ Moreover, although the Urgent Deficiency Appropriation Bill reported to and passed by the House rescinded \$9,000,000 of a previous appropriation, it gave no indication that the exercise by the Temporary Controls Administrator of functions authorized under the Emergency Price Control Act was unlawful; indeed, the original House bill specifically referred to the "Office of Price Administration, Office of Temporary Controls" as a unit within the Office for Emergency Management in the Executive Office.

²⁶ See pp. 1-4, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 80th Cong., 1st Sess., on the Urgent Deficiency Appropriation Bill for 1947, H. R. 1968. The pertinent testimony in regard to the structure of the Office of Temporary Controls is as follows:

The CHAIRMAN. We have a recommendation from the President, contained in House Document No. 55, for the rescission of \$1,200,000 from the current appropriation for the Office of Temporary Controls. It is noted that the entire amount will be from the funds available for salaries and expenses of the Civilian Production Administration.

General FLEMING, there was appropriated for the Office of Price Administration \$101,000,000. Your expenditures to the 30th of November 1946 were \$56,971,636. That leaves a balance of \$44,020,000. * * *

General FLEMING. Mr. Chairman, I wonder if I might make a preliminary statement on the whole Office of Temporary Controls and then take up the various constituent units one by one, in order? * * *

General FLEMING. Many members of the Appropriations Committee have become accustomed to my appearances be-

of the President. And the bill as amended and passed by the Senate on March 5, 1947, restored the \$9,000,000 rescinded by the House and appropriates "for carrying out the functions of the Office of Price Administration *transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls*, \$7,991,815, which amount shall be merged with the funds transferred, *pursuant to said Executive order*, from the appropriation 'Salaries and expenses', Office of Price Administration, in the Third Deficiency Appropriation Act, 1946." [Italics supplied.] The bill as amended in conference which was passed by both Houses of Congress and approved by the President on March 22, 1947 (Pub. Law No. 20, 80th Cong.,

fore it in my principal role of Federal Works Administrator. Today, however, I am appearing before this subcommittee for the first time in the additional capacity of Temporary Controls Administrator.

In brief, the Office of Temporary Controls was created by the President by Executive Order 9809 on December 12, 1946, and I was appointed by the President as Temporary Controls Administrator in addition to being Federal Works Administrator and without any additional compensation from the Government. * * *

Today, this committee is making particular inquiry into the status of funds appropriated to each of the constituents of the Office of Temporary Controls with the objective of disclosing any portions of those funds which may be no longer necessary to meet the expense of the continuing temporary programs and the costs of liquidation and thus may be susceptible to immediate rescission * * *

See also pp. 1-12, Hearings before the Committee on Appropriations, Senate, 80th Cong., 1st Sess., on the Urgent Deficiency Appropriation Bill for 1947, H. R. 1968.

1st Sess.) contains substantially the same language (which is set forth below ²⁷) with respect to the transfer. Such treatment of the transfer of functions of the Office of Price Administration to the Office of Temporary Controls and the recognition of the status of the Temporary Controls Administrator by the Congress demonstrates its acceptance or ratification of the President's action in Executive Order 9809. See *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-303; *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139; *Brooks v. Dewar*, 313 U. S. 354.

II. The substitution here effected complies with the statutory provisions governing substitution

Respondents object to the substitution of General Fleming for Mr. Porter on the grounds that the Temporary Controls Administrator is not a successor in office to the Price Administrator within the meaning of Section 11 (a) of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C., Supp. V, 780, *infra*, pp. 42-43, and that there is no substantial need for continuing and maintaining the action in view of the fact that the commodities involved have been exempted from future price ceiling requirements. Both of these contentions are without merit.

²⁷ "Salaries and expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752 to be available for the payment of terminal leave only: * * *

Executive Order 9809 specifically provides that the Temporary Controls Administrator shall be vested with all the functions of the Price Administrator, including the right to institute new and maintain pending actions. He is, therefore, very clearly the successor to the functions of the Price Administrator, if not to his title. There is nothing sacrosanct about the specific title of the office which would alone carry with it all the indices of succession; the material factor is the succession to the powers and duties. In the only reported decision which we have found dealing with this issue, it was held that the substitution provisions apply not only to cases where one individual succeeded another in the same office, but to situations like the present one, where the duties of one office were transferred to another. *United States ex rel, Ordmann v. Cummings* (App. D. C.) 85 F. 2d 273; Cyc. of Fed. Procedure, 2d Ed., Vol. 7, pp. 334-35. Moreover, as indicated previously (See Point E, *supra*, pp. 26-29) Congress has treated the Temporary Controls Administrator as the lawful successor to the Price Administrator.

Respondents further suggest that the Administrator cannot comply with the provisions of Section 11 (a), *supra*, in that he cannot show any "substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved," in view of the "repeal" of the price control program. However,

respondents have mistaken the purpose of this provision, which is derived from the original Act of February 8, 1899, 30 Stat. 822.²⁸ The legislative history of the Act of 1899 indicates that the requirement of a showing of substantial need for continuing the action was not intended to apply to a case such as the present one where a public official seeks to continue a suit on behalf of the United States where such suit was started by a predecessor in office. Its purpose was, where suit had been started against a predecessor in office, to give the successor an opportunity to perform in accord with the gravamen of the citizen's complaint and thereby *prevent the survival* of the action against him.²⁹ Therefore, the statute

²⁸ In enacting Section 11 (a) some minor revisions of the Act of 1899 were made in the language of the first paragraph (e. g., "showing a necessity for the survival thereof to obtain a settlement of the questions involved," was changed to "satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved"), and a new paragraph was added to provide for substitution of state, county, and city officials. The only reference to the section made in the report which accompanied the bill is to the added new paragraph, stating that "State, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice" (House Report 1075, 68th Cong., 2d Sess., p. 7). The absence of any reference to the slight verbal differences in the first paragraph is persuasive that a change in the character of the showing to obtain substitution was not intended.

²⁹ Representative Connolly, who was in charge of the bill, explained its purpose as follows: "The plaintiff may file a petition showing the necessity for the continuance of the

should not be construed as requiring the Administrator, when suing for the benefit of the United States, to make a showing of substantial need for maintaining the action and obtaining an adjudication of the litigated issues.

action to obtain a settlement of the questions involved. It does not seek absolutely to impose the costs that have accrued upon the new defendant, but leaves that to the discretion of the court. So that with this law it would be found when this new official comes in while a suit of that kind [suit for relief from action of a public official where the official dies while the case is on appeal] is pending before the court as against his predecessor, the new official will have to carry out the law; and if he carries it out within the purpose of the suit pending in the case there is no further necessity for prosecuting it.

"If, however, he declines to comply with the demands made upon him, then, upon filing petition in the court showing his declination and showing the necessity for a continuance of the suit against him in order to have the action settled, the court is authorized to have the suit survive against him and make whatever order is equitable. The gentleman concedes that the law is right as far as it goes, but thinks that it might apply in other cases besides mandamus and injunctions, but the committee could conceive of no other case where the suit could be brought by or against an official, in his official capacity, in order to obtain a construction of law." (31 Cong. Rec. 3866.) [Italics added.]

House Report 960 (55th Cong., 2d Sess.) which accompanied the bill is to the same effect: "The proper disposition of costs already accrued in such cases presents some difficulty. A mandamus proceeding against an officer is based upon the claim that he is personally refusing to perform some duty which the law requires of him in his official character, and if decided against him he is properly liable, personally, for all cost of the proceeding, but if he vacates the office before a decision, it might seem harsh to compel his successor to be-

However, conceding *arguendo*, that such a showing is required, the court may take judicial notice of the substantial need for maintaining the present action and obtaining an adjudication of the issues involved. Respondents argue that since all commodities except rice, sugar, and rent are exempt from price control, no purpose of a price-control program is furthered by an investigation of their business activities in the period when controls were in effect. However, assuming, without conceding, that a decision in the present action will not aid any current program,³⁰ Congress has both generally,³¹ and explicitly³² in the Act here involved, stated a policy of equal treatment for accrued liabilities whether or not suit is

come a party to the suit and to the costs already accrued without having been guilty of any personal neglect of the official duty involved in the proceeding; but to provide against this seeming harshness *your committee proposes to amend the bill*" (adding "showing a necessity for the continuance of the action to obtain a settlement of the questions involved") "*so as to give the succeeding official an opportunity to perform the official act involved in the proceeding and thereby prevent the survival of the action against himself, and if he fails to do so, he can not then complain of being mulct in costs accruing against his predecessor.*" [Italics added.] See also footnote 28, p. 31.

³⁰ However, a decision in the present case on the major issue on the merits, whether the Administrator can delegate to subordinates power to issue administrative subpoenas, will aid the current program in rice, sugar, and rent.

³¹ Rev. Stat. 13, as amended, 58 Stat. 118, 1 U. S. C. 29.

³² Sec. 1 (b) of the Emergency Price Control Act.

started prior to the termination date of the Act. Moreover, the Act itself is still in full force and effect, and it is well established that revocation or amendment of a regulation does not affect liabilities incurred prior to such revocation or amendment. *United States v. Hark* 320 U. S. 531; *Utah Junk Co. v. Porter*, 328 U. S. 39, 44; *Collins v. Porter*, 328 U. S. 46. The equal treatment contemplated by Congress cannot be achieved unless the investigatory functions of the Administrator are allowed to continue unimpaired for the duration of the enforcement period.³³

In short, insofar as Section 11 (a) is applicable to the present case, its requirements have been satisfied.

The opinions in *Porter v. Ryan* (U. S. D. C., Ore.) Civil No. 3246, decided by Judge McCulloch on January 8, 1947, and *Porter v. Hirahara* (U. S. D. C., Hawaii) Civil No. 760, decided by Judge McLaughlin on January 29, 1947, denying substitution of General Fleming for Mr. Porter, do not indicate that they have considered the arguments here presented. Both of these de-

³³ It is worth noting that the investigation here contemplated may well have enforcement consequences, since the statute of limitations on such violations as may be uncovered by an examination of defendants' records will not finally bar any possible damage suit until November 10, 1947.

cisions are being appealed by the Temporary Controls Administrator. On the other hand in *Fleming v. Black* (U. S. D. C., E. D. Pa.) Civil No. 5700, Judge Ganey after hearing on objections filed by defendants granted substitution. As a result of this decision substitution was granted in about 160 other cases in the district. Substitution was similarly granted in *Fleming v. Krimm Lumber Co.* (U. S. D. C., W. D. Pa.) Civil No. 1495, on February 15, 1947; in *Fleming v. Donner-Hanna Co.* (U. S. D. C., W. D. N. Y.) Civil No. 1892, on February 14, 1947; *Fleming v. Aaron* (U. S. D. C., W. D. Tenn.) Civil No. 1154, decided on March 12, 1947; *Fleming v. Anderson Motor Co.* (U. S. D. C., Md.) Civil No. 3249, decided on February 28, 1947; *Fleming v. Ell-Carr Co., Inc.* (U. S. D. C., S. D. W. Y.), Civil No. 33-668, decided March 20, 1947; and in *Fleming v. Woodward d/b/a White Satin Dairy and Produce Co.* (Sup. Ct. Oregon) decided on February 18, 1947. In addition a large number of appellate and trial courts throughout the country have granted substitution in cases where no objections have been made.

CONCLUSION

For the reasons stated, the substitution of Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter, Administrator of

the Office of Price Administration should not be vacated.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JOHN R. BENNEY,
Attorney.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,

DAVID LONDON,
Director, Litigation Division,

SAMUEL MERMIN,
Solicitor, Litigation Division,

JACOB W. ROSENTHAL,
Attorney,

Office of Price Administration,
Office of Temporary Controls.

MARCH 1947.

APPENDIX

1. Pertinent provisions of the First War Powers Act (55 Stat. 838, 50 U. S. C. App., Supp. V, 601 et seq):

SECTION 1. That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935: *Provided*, That the termination of this title shall not affect any act done or any right or obligation accruing or accrued pursuant to this title and during the time that this title is in force: *Provided further*, That the authority by this title granted shall be exercised only

in matters relating to the conduct of the present war: *Provided further*, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions.

SEC. 2. That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.

SEC. 3. That for the purpose of carrying out the provisions of this title, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, governmental corporation, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said functions, except to the extent hereafter authorized by the Congress in appropriation Acts or otherwise.

SEC. 4. That should the President, in redistributing the functions among the executive agencies as provided in this title, conclude that any bureau should be abolished and its duties and functions conferred upon some other department

or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

SEC. 5. That all laws or parts of laws conflicting with the provisions of this title are to the extent of such conflict suspended while this title is in force.

Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding.

* * * * *

SEC. 401. Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate.

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632; 59 Stat. 306, Public Law 548, 79th Cong., 2d sess., 50 U. S. C. App., Supp. V, 901 et seq.:

SECTION 1. (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not neces-

sary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 1A. (c) Recommendations by the President to the Congress.—(1) As soon as practicable after the enactment of this section and in any event on or before January 15, 1947, the President shall recommend to the Congress such further legislation as in his judgment is needed to establish monetary, fiscal, and other policies which are adequate to supplement the control of prices and wages during the balance of the fiscal year 1947, and to insure that general control of prices and wages can be terminated by the end of that fiscal year without danger of inflation thereafter.

(2) On or before April 1, 1947, the President shall report to the Congress what, if any, commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate, in his judgment, the continuance of the powers granted by this Act as to them after June 30, 1947, together with his recommendations as to established departments or agencies of the Government (other than the Office of Price Administration) which should be charged with the administration of such powers.

SEC. 201. (b) The principal office of the Ad-

ministrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

Revised Statutes, Section 13, as amended (58 Stat. 118, 1 U. S. C. 29):

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement.

of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Pertinent provisions of Section 11 (a) of the Act of February 13, 1925, to amend the Judicial Code and for other purposes, 43 Stat. 936, 941, 28 U. S. C., Supp. V, 780:

(a) Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

2. Provisions of Proclamation 2714 (12 F. R. 1):

A PROCLAMATION

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessa-

tion of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

[s] HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
The Secretary of State.

Executive Order No. 9809 (11 F. R. 14281):

PROVIDING FOR THE DISPOSITION OF CERTAIN
WAR AGENCIES

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the

Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending).

3. (a) The advisory board provided for in section 102 of the War Mobilization and Reconversion Act of 1944 and its functions, which shall remain vested in such board, are transferred to the Office of Temporary Controls.

(b) The Economic Stabilization Board (transferred to the Office of War Mobiliza-

tion and Reconversion by Executive Order No. 9762 of July 25, 1946) and its functions are terminated.

4. The functions of the Director of War Mobilization and Reconversion under subsections (c) (1), (c) (2), (c) (3), and (c) (4) of section 101 of the War Mobilization and Reconversion Act of 1944 are transferred to the President.

5. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9568 of June 8, 1945 and of Executive Order No. 9604 of August 25, 1945 (with respect to the declassification, release, and publication of certain technical, scientific, and industrial information which has been classified as secret, confidential, or restricted), are transferred to the Secretary of Commerce.

6. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9791 of October 17, 1946 (with respect to the study of scientific research and development activities), are transferred to the Executive Office of the President and shall be administered therein as the President may determine.

7. The functions of the Media Programming Division and the Motion Picture Division of the Office of War Mobilization and Reconversion, and the functions which were transferred from the Bureau of Special Services of the Office of War Information to the Bureau of the Budget by the provisions of paragraph 1 (b) of Executive Order No. 9608 of August 31, 1945, are transferred to the Office of Government Reports, which is re-established as an agency in the Executive Office of the Presi-

dent on the same basis and with the same functions as obtained immediately prior to the promulgation of Executive Order No. 9182 of June 13, 1942. The functions of the Director of War Mobilization and Reconversion with respect to the functions of the said Divisions and the functions of the Director of the Bureau of the Budget with respect to the said functions of the Bureau of the Budget are transferred to the Director of the Office of Government Reports.

8. There are transferred to the Department of the Treasury (a) the functions of the Office of Contract Settlement, (b) the Appeal Board established under section 13 (d) of the Contract Settlement Act of 1944, (c) the Contract Settlement Advisory Board created by section 5 of the said Act, and (d) the functions of such boards, which shall remain vested therein, respectively. The functions of the Director of Contract Settlement, and the functions of the Director of War Mobilization and Reconversion under section 101 (b) of the War Mobilization and Reconversion Act of 1944 with respect to the Office of Contract Settlement, are transferred to the Secretary of the Treasury.

9. The functions of the Financial Reporting Division of the Office of Price Administration, together with the functions of the Price Administrator with respect thereto, are transferred to the Federal Trade Commission.

10. (a) The National Wage Stabilization Board is terminated.

(b) The functions heretofore vested in the National Wage Stabilization Board pursuant to the provisions of section 5 (a)

of the Stabilization Act of 1942, as amended, are transferred to the Department of the Treasury.

(c) The functions under section 5 of the War Labor Disputes Act now vested in the National Wage Stabilization Board shall be administered by a special board or boards to be constituted as may be necessary by the Secretary of Labor from among the members of a panel to be appointed by the President for that purpose.

(d) The tripartite Steel Commission, (created by the National War Labor Board on March 30, 1945) shall continue to carry out its functions within the Department of Labor until such date as the Secretary of Labor may fix for its termination.

(e) All other functions of the National Wage Stabilization Board are transferred to the Secretary of Labor.

11. The authority, records, property, and personnel which relate primarily to the functions redistributed by this order are transferred to the respective agencies in which functions are vested pursuant to the provisions of this order and the funds which relate primarily to such functions are transferred or otherwise made available to such respective agencies: *Provided*, That the Director of the Bureau of the Budget may in any case limit the records, property, personnel, and funds to be so transferred or made available to so much thereof as he deems to be required for the administration of the transferred functions. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director of the Bureau of the Budget may

direct and by such agencies as he may designate. All personnel transferred under the provisions of this order which the transferee agencies shall respectively find to be in excess of the personnel necessary for the administration of the functions transferred to such agencies by this order shall, if not retransferred under existing law to other positions in the Government, be separated from the service.

12. All prior Executive orders or parts thereof in conflict with this order are amended accordingly. All other prior orders, regulations, rulings, directives, and other actions relating to any function or agency transferred by this order or issued by any such agency shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

13. The provisions of this order shall become effective immediately except that the provisions of paragraph 10 hereof, and those of paragraph 11 to the extent that they relate to the functions referred to in paragraph 10, shall become effective on February 24, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,
December 12, 1946.

3. Provisions of Supplementary Order 193, as amended (11 F. R. 13464):

PART 1305—ADMINISTRATION

EXEMPTION FROM PRICE CONTROL OF ALL
COMMODITIES EXCEPT SUGAR AND RICE

SECTION 1. *Commodities exempt.*—All commodities (including services) are exempt from price control except:

(a) Sugar and sugar solutions derived from sugar cane or sugar beets, including all grades of edible syrups and molasses, and blackstrap molasses (imported and domestic);

(b) Corn syrup and corn sugar (imported and domestic);

(c) Blended syrups (imported and domestic) which contain at least 20% by weight or volume of sugar, sugar solutions, corn syrup or corn sugar, either singly or in combination; and

(d) Rice, rough and milled (imported and domestic).

SEC. 2. *Preservation of records.*—Records shall be preserved as provided by Supplementary Order 189.

SEC. 3. *Stabilization Act of 1942, as amended.*—This order does not affect the notice requirements of section 1 of the Stabilization Act of 1942, as amended, applicable to common carriers and other public utilities.

This Supplementary Order No. 193 shall become effective as of 12:01 a. m. November 10, 1946.

Issued this 12th day of November 1946.

PAUL A. PORTER,
Administrator.

Amendment No. 1 to Supplementary Order 193
(11 F. R. 13637):

ELIMINATION OF CERTAIN REPORTING REQUIREMENTS

Supplementary Order 193 is amended by the addition of a new section reading as follows:

SEC. 4. *Elimination of certain reporting requirements.*—All requirements in any

regulation or orders that a seller or buyer of a commodity or service report to the Office of Price Administration the price he is presently charging or paying for a commodity or service which has been exempted from price control, are hereby revoked.

This amendment is effective immediately.
Issued this 19th day of November 1946.

PAUL A. PORTER;
Administrator.